No. 557

[illegible]

In the Supreme Court of the United States

October Term, 1970

UNITED STATES OF AMERICA,

Appellant,

v.

INTERNATIONAL MINERALS & CHEMICAL CORPORATION,

Appellee.

ON CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION TO AFFIRM

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Appellee, International Minerals & Chemical Corporation (IMC), defendant in the district court, respectfully moves, pursuant to rule 16 of the rules of this Court, that the judgment of the district court granting appellee's motion to dismiss the information be affirmed on the ground that the question presented by this appeal is so lacking in substance as not to warrant further briefing or oral argument.

QUESTION PRESENTED

Whether an offense against the United States under 18 U.S.C. §834(f), which imposes criminal liability on anyone who "knowingly violates" regulations governing the transportation of hazardous materials, is sufficiently charged by a criminal information which does not allege that defendant knowingly violated the regulations but only that defendant knowingly did certain acts, or failed to do certain acts, in violation of such regulations.

STATUTES AND REGULATION INVOLVED

Title 18 U.S.C. sections 834(a) and 834(f) are set forth in the jurisdictional statement (pp. 3-4).

The regulation involved (49 C.F.R. 173.427(a)) was quoted in part in the jurisdictional statement (p. 4) but a relevant portion was omitted. In pertinent part, the regulation reads as follows:

> (a) Each shipper offering for transportation any dangerous article subject to the regulations in this chapter, shall describe that article on the shipping paper by the shipping name prescribed in § 172.5 of this chapter and by the classification prescribed in § 172.4 of this chapter, and may add a further description not inconsistent therewith. Abbreviations must not be used. . . .

STATEMENT

On March 2, 1970, the United States filed a five-count information against appellee, purportedly under 18 U.S.C. §834(f), alleging that appellee knowingly failed to show on the shipping papers covering four shipments of sulfuric acid (counts 1-4) and one shipment of hydrofluosilicic acid (count 5), all in tank truck quantities, from its plant at Lockland, Ohio, the required shipping classification, to wit, a corrosive liquid (counts 1, 2, and 4) or the proper name

and required shipping classification (counts 3 and 5). The bills of lading involved in counts 1, 2, and 4 showed the proper name in full, to wit, sulfuric acid. The bill of lading involved in count 3 described the commodity as Sul. Acid. The bill of lading in count 5 described the commodity as HFS Acid. None of the bills of lading showed the required shipping classification, a corrosive liquid. The requirement that the shipping papers show the required shipping classification is of relatively recent origin, having been added to the regulation by an amendment published in the Federal Register on September 21, 1967, to become effective December 1, 1967. 32 F.R. No. 183, p. 13324. Prior to that date, such information was not required to be shown on the shipping papers.

The information did not charge appellee with "knowingly" violating the regulation, and appellee, believing that it did not knowingly violate such regulation, filed in the district court a motion to dismiss the information on the ground that it did not state facts sufficient to constitute an offense against the United States under 18 U.S.C. §834(f). After consideration of memoranda submitted by the parties in support of their respective positions, the court, the Honorable David S. Porter, entered a judgment order dismissing each count of the information. (J.S. 19-21).

NO SUBSTANTIAL QUESTION IS PRESENTED BY THIS APPEAL

This appeal presents but a single simple question: Was the information sufficient to allege an offense against the United States under 18 U.S.C. §834(f)? The Government's attempt to convert this case into one involving profound questions relating to the construction and application of the terms of the statute and the amount of proof necessary

to sustain a conviction thereunder have no basis. Failure to understand the limited nature of the question presented colors the Government's entire presentation. Most of what is said in the jurisdictional statement is simply not relevant to the simple question here presented.

The offense proscribed by 18 U.S.C. §834(f) is "knowingly" violating an applicable regulation. The information filed herein did not charge defendant with knowingly violating the regulation, but only with knowingly failing to show on the shipping papers the required classification or name and classification of the property shipped. Appellant contends this is sufficient to charge a crime under 18 U.S.C. §834(f), saying (J.S. 15):

> Since the information in this case clearly alleged, as to all counts, that the appellee "did knowingly" do the acts which constitute violations of the applicable regulation, the district judge erred in granting the motion to dismiss.

It would seem to be obvious, however, from the provisions of the statute, that, under 18 U.S.C. §834(f), the proscribed offense is the knowing violation of a regulation, not the knowing doing of an act, or knowing failure to take some action, which happens to be in violation of the regulation; and this, indeed, has been the settled construction of the statute.

Prior to the present codification of the statute, the statutory provision here involved, 18 U.S.C. §834(f), appeared in 18 U.S.C. §835. Construing that specific provision, in *Boyce Motor Lines* v. *United States*, 342 U.S. 337, 342, 343, this court pointed out that the provision in question "punishes only those who knowingly violate the Regulation." Following the decision in that case, the lower courts have, over a period of more than 15 years, held that actual knowledge of the regulation is an essential

element of the crime. *St. Johnsbury Trucking Company* v. *United States,* 220 F.2d 393, 397 (1st Cir., 1955); *United States* v. *Chicago Express,* 235 F.2d 785, 786 (7th Cir., 1956); *United States* v. *Deer,* 131 F.Supp. 319, 320 (E.D., Wash., 1955).

The Government is incorrect when it says (J.S. 7) that the district court held that the statute "requires an allegation and proof of a specific intent to violate the terms of a known regulation." The district court did not so hold. Applying the settled construction of the law, the district court simply held that "knowledge of violating the above I.C.C. regulation is an essential element of the crime charged under 18 U.S.C. §834(f)." (J.S. 20). Accordingly, since the Government did not charge appellee with "knowingly" violating the regulation, the court dismissed the information.

The cases cited by appellant are not in point. The decision of the Court of Appeals for the Tenth Circuit in *Texas-Oklahoma Express, Inc.* v. *United States,* 429 F.2d 100 (10th Cir., 1970) (J.S. 10) was concerned with whether the Government's proof was sufficient to sustain a conviction for knowingly violating a regulation. The decision was not concerned with the sufficiency of the information and it did not hold, as implied by the Government, that knowledge of the regulation was not an essential element of the crime. On the contrary, the court pointed out that defendants were "charged with knowledge of the Regulation in question" and admitted "actual knowledge" thereof. (*id.,* p. 104)

The decisions in *United States* v. *E. Brooke Matlack, Inc.,* 149 F.Supp. 814 (D. Md., 1957) and *Steere Tank Lines, Inc.* v. *United States,* 330 F.2d 719 (5th Cir., 1964) (J.S. 10-11) are readily distinguishable. Both involved a

different statute and, in each case, the court held that the offense involved was of the malum prohibitum or public welfare type. In each case the court considered and distinguished *Boyce* and *St. Johnsbury*.

Appellant's argument (J.S. 7) that dismissal of the information is at odds with the fundamental concept in our jurisprudence, that "ignorance of the law will not excuse", is not apposite in the present case. That argument has no applicability in the case of a statutory crime where the legislature, in defining the crime, makes knowledge of the regulation an essential element of the crime. As Judge Magruder so clearly put it, in his concurring opinion in *St. Johnsbury* (220 F.2d at 398):

> If a statute provides that it shall be an offense "knowingly" to sell adulterated milk, the offense is complete if the defendant sells what he knows to be adulterated milk, even though he does not know of the existence of the criminal statute, on the time-honored principle of the criminal law that ignorance of the law is no excuse. But where a statute provides, as does 18 U.S.C. § 835, that whoever knowingly violates a regulation of the Interstate Commerce Commission shall be guilty of an offense, it would seem that a person could not knowingly violate a regulation unless he knows of the terms of the regulation and knows that what he is doing is contrary to the regulation. Here again the definition of the offense is within the control and discretion of the legislature.

The Government's references to the legislative history have no relevance to the question here presented: the sufficiency of the information to charge a crime under 18 U.S.C. §834(f). The courts have consistently held that, under that section, knowledge of the regulation is an essential element of the crime. The Government has cited no authority to the contrary. Furthermore, the terms of the statute are clear and unambiguous, so there is no reason

to resort to legislative history in any event. *United States* v. *Standard Brewery,* 251 U.S. 210, 217; *United States* v. *Missouri Pacific R. Co.,* 278 U.S. 269, 278.

But even if the legislative history were relevant to the question here presented, it simply points up the weakness of the position taken by the Government. As appellant shows (J.S. 11-15), after the decision of this court in *Boyce* and the decision of the Court of Appeals for the First Circuit in *St. Johnsbury,* both of which involved the same statutory provision as is here involved, a bill was introduced in the Senate to amend the statute to require only that the defendant know that the Commission had established regulations for the transportation of dangerous articles. But the House of Representatives refused to accede to the Senate bill, and amended it to retain the existing language, specifically stating (J.S. 14):

> The present Transportation and Explosives Act requires that a violation "knowingly" be committed before penalty may be inflicted for such violation. Under the present law there is judicial pronouncement as to the standards of conduct that make a violation a "knowing" violation . . . It is the purpose of this amendment to retain the present law by providing that a person must "knowingly" violate the regulations.

Such language could hardly be more clear. The Government's suggestion that Congress did not change the statute because it thought this Court and the Court of Appeals for the First Circuit had misconstrued it, though ingenious, does not comport with the facts.

An indictment or information must allege all of the essential elements of the crime charged. *United States* v. *Debrow,* 346 U.S. 375, 376; *United States* v. *Seeger,* 303 F.2d 478, 482 (2nd Cir., 1962); *Clay* v. *United States,* 218 F.2d 483, 486 (5th Cir., 1955); *United States* v. *Tornabene,* 222 F.2d 875, 878 (3rd Cir., 1955); Rule 7(c),

18 U.S.C. Where a statute, by its express terms, makes knowledge of the regulation claimed to be violated an essential element of the crime, the failure to allege that defendant "knowingly" violated the regulation is fatally defective. *United States* v. *Deer,* 131 F.Supp. 319, 320 (E.D. Wash., 1955); see also *United States* v. *Valenti,* 74 F.Supp. 718, 720 (W.D. Pa., 1947). Since the information here involved made no such allegation, it is clear beyond the slightest doubt that it was properly dismissed by the district court.

CONCLUSION

For the reasons above set forth, it is respectfully submitted that this appeal presents no substantial question warranting further briefing and argument. The judgment of the district court dismissing the information should be affirmed.

Respectfully submitted,

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